(17) (16)

Nos. 94-1893, 94-1900

Supreme Court, U.S.
FILED
OCT 18 1995
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, ET AL.;
NATIONAL CABLE TELEVISION ASSOCIATION, INC.
Petitioners,

v.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA, *ET AL.*, *Respondents*.

On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR *AMICI CURIAE* UNITED STATES TELEPHONE ASSOCIATION, NATIONAL TELEPHONE COOPERATIVE ASSOCIATION, ORGANIZATION FOR THE PROTECTION AND ADVANCEMENT OF SMALL TELEPHONE COMPANIES, AMERITECH CORPORATION, CINCINNATI BELL, FRONTIER CORPORATION, ILLINOIS CONSOLIDATED TELEPHONE COMPANY, NYNEX CORPORATION, PACIFIC TELESIS GROUP, SBC COMMUNICATIONS INC., AND THE SOUTHERN NEW ENGLAND TELEPHONE COMPANY, IN SUPPORT OF RESPONDENTS

MARY MCDERMOTT
LINDA KENT
CHARLES D. COSSON
1401 H Street, N.W.
Washington, D.C. 20005
Counsel for United States Telephone Association

MICHAEL W. MCCONNELL*
KENNETH S. GELLER
H. THOMAS BYRON III
Mayer, Brown & Platt
2000 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 463-2000

Counsel for Amici Curiae

* *Counsel of Record*

39 pp

BEST AVAILABLE COPY

DAVID COSSON
L. MARIE GUILLORY
2626 Pennsylvania Ave., N.W.
Washington, D.C. 20037
Counsel for The National
Telephone Cooperative Assoc.

THOMAS P. HESTER
KELLY R. WELSH
30 South Wacker Drive
Chicago, Illinois 60606
Counsel for Ameritech Corp.

THOMAS E. TAYLOR
CHRISTOPHER J. WILSON
Frost & Jacobs
2500 PNC Center
201 East Fifth Street
Cincinnati, Ohio 45202
Counsel for Cincinnati Bell
Telephone Company

MICHAEL J. SHORTLEY, III
180 South Clinton Avenue
Rochester, New York 14646
Counsel for Frontier Corp.

ELLYN ELISE CRUTCHER
121 South 17th Street
Mattoon, Illinois 61938

OWEN E. MACBRIDE
Schiff, Hardin & Waite
7200 Sears Tower
Chicago, Illinois 60606
Counsel for Illinois Consolidated Telephone Company

LISA M. ZAINA
21 Dupont Circle, N.W.
Washington, D.C. 20036
Counsel for The Organization for
the Protection and Advancement
of Small Telephone Companies

MORRISON DES. WEBB
JOHN M. CLARKE
JOHN P. WALSH
1113 Westchester Avenue
White Plains, New York 10604
Counsel for NYNEX Corp.

RICHARD W. ODGERS
LUCILLE M. MATES
130 Kearny Street
San Francisco, Calif. 94108

ALAN F. CIAMPORCERO
1275 Pennsylvania Ave.,N.W.
Washington, D.C. 20004
Counsel for Pacific
Telesis Group

JAMES D. ELLIS
LIAM S. COONAN
KELLY M. MURRAY
MARY W. MARKS
175 E. Houston
San Antonio, Texas 78205

MARTIN E. GRAMBOW
1401 I Street, N.W.
Washington, D.C. 20005
Counsel for SBC Communications
Inc.

MADELYN M. DEMATTEO
ALFRED J. BRUNETTI
227 Church Street
New Haven, Conn. 06510
Counsel for The Southern
New England Telephone Co.

BEST AVAILABLE COPY

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Miscellaneous

INTEREST OF THE AMICI CURIAE

Amici curiae are companies (and industry associations whose members are companies) that provide telecommunications services to the general public, including local telephone service regulated as common carriage under state law and the federal Communications Act of 1934.[1] *Amici* file this brief in opposition to petitioners' arguments that 47 U.S.C. § 533(b), which prohibits telephone companies from providing "video programming" directly to subscribers within their service areas, can be reconciled with the First Amendment.[2]

Like respondent Bell Atlantic, each *amicus* here has successfully brought suit to vindicate its First Amendment right to offer video programming. In ten different cases, federal courts across the country have unanimously held without dissent that Section 533(b) violates the First Amendment.[3] Petitioners would have this Court

---

[1] *Amici* United States Telephone Association, National Telephone Cooperative Association, and Organization for the Protection and Advancement of Small Telephone Companies are industry associations whose members — approximately 1400 companies — include virtually all of the traditional local telephone companies in the United States. *Amici* Ameritech Corporation, Cincinnati Bell, Frontier Corporation, Illinois Consolidated Telephone Company, NYNEX Corporation, Pacific Telesis Group, SBC Communications Inc., Southern New England Telephone Company, are some of the largest companies whose affiliates or subsidiaries are engaged in the business of providing communications services, including local telephone service. Together with respondents and *amici* U S West, Inc., BellSouth Corporation, East Ascension Telephone Company, and GTE Corporation, *amici* represent virtually every company subject to the free speech restriction in 47 U.S.C. § 533(b).

[2] The parties' letters of consent to the filing of this brief have been filed with the Clerk pursuant to Rule 37.3 of the Rules of this Court.

[3] *U S West, Inc.* v. *United States*, 48 F.3d 1092 (9th Cir. 1994), pet. for cert. filed, No. 95-315 (Aug. 23, 1995); *Pacific Telesis Group* v. *United States*, 48 F.3d 1106 (9th Cir. 1994), pet. for cert. filed, No. 95-315 (Aug. 23, 1995); *Southern New England Tel. Co.* v. *United States*, No. 3:94-CV-80 (DJS) (D. Conn. Apr. 27, 1995), appeal pending, No. 95-6137 (2d Cir.); *Southwestern Bell Co.* v. *United States*, No. 3:94-CV-0193-D (N.D. Tex. Mar. 27, 1995), appeal pending, No. 95-10478 (5th Cir.); *GTE South, Inc.* v. *United States*, No. CA-94-1588-A (E.D. Va.

overturn those unanimous rulings. *Amici* therefore have a substantial interest in this Court's resolution of this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

A. Telecommunications services were formerly divided along technological lines. Telephone companies offered voice and data communications services, while cable companies offered transmission of video programming. Although telephone companies today are willing and able to provide cable service, 47 U.S.C. § 533(b) prevents them from competing with incumbent cable operators.

This Court recognized the distortions caused by the monopoly position of cable operators when it reviewed the 1992 Cable Act in *Turner Broadcasting Sys.* v. *FCC*, 114 S. Ct. 2445, 2454-2466 (1994). Petitioners now attempt to preserve the status quo in that market and continue to protect the cable industry from competition. *E.g.*, Gov't Br. 3; NCTA Br. 3.[4]

But the monopolistic system is giving way to technological, economic, and regulatory changes affecting telephone and cable service. Technology now makes possible the convergence of previously distinct services, providing opportunities for competition where none existed before. Consumers expect new services that combine the abilities of previously distinct industries. At the same

---

Feb 10, 1995), appeal pending, No. 95-1738 (4th Cir.); *United States Tel. Ass'n* v. *United States*, No. 1:94CV01961 (D.D.C. Feb. 14, 1995), appeal pending, No. 95-5117 (D.C. Cir.); *NYNEX Corp.* v. *United States*, No. 93-1523-P-C (D. Me. Dec. 8, 1994), appeal pending, No. 95-1183 (1st Cir.); *BellSouth Corp.* v. *United States*, 868 F. Supp. 1335 (N.D. Ala. 1994), appeal pending, No. 94-7036 (11th Cir.); *Ameritech Corp.* v. *United States*, 867 F. Supp. 721 (N.D. Ill. 1994), appeal pending, No. 95-1223 (7th Cir.).

[4] "Gov't Br." refers to the Brief for the Federal Petitioners. "NCTA Br." refers to the Brief for Petitioner National Cable Television Association, Inc. "Pet. App." refers to the opinions of the courts below, reprinted in the Appendix to the government's Petition for Writ of Certiorari in No. 94-1893. "J.A." refers to the Joint Appendix in the consolidated cases before this Court. "Ct. App. J.A." refers to the joint appendix before the court of appeals.

time, regulators have developed far more sophisticated methods of identifying and preventing anticompetitive abuses by regulated entities.

Section 533(b) prevents the natural development of technological solutions to the problems of cable monopoly. As a consequence, the statute limits the number of cable television operators and harms fundamental First Amendment principles encouraging more speech and greater diversity among speakers.

B. This Court should, at a minimum, apply intermediate scrutiny to determine the constitutionality of Section 533(b). The government bears a substantial burden under that standard: it must show that the regulation actually furthers a substantial government interest and that it is narrowly tailored (*i.e.*, that it does not burden more speech than is necessary to achieve the government's purpose). Congress made no findings or predictive judgments in 1984 (when it enacted Section 533(b)) or later; nor did it consider less restrictive alternatives. Instead, it simply codified the Federal Communications Commission's (FCC's) existing regulatory ban. Thus, there is no basis for this Court to defer to Congress concerning the statute's justification. Even imputing to Congress the reasons given by the FCC for its prior regulatory restriction, this Court should strike down the statute because those reasons no longer pertain, as the FCC itself has found.

The statute cannot survive intermediate scrutiny. Petitioners argue that Congress might have imposed a ban on video speech out of concern that regulatory measures would be inadequate to prevent telephone companies from engaging in anticompetitive behavior (discrimination or cross-subsidization) in the cable market. But the government petitioners themselves have repeatedly found (and argued in judicial and regulatory proceedings) that there is no real risk of such anticompetitive behavior. Those official government findings are confirmed by court decisions and regulatory developments: there is simply no need for a ban on speech. Section 533(b) cannot be justified as protecting or enhancing competition in the cable market. That market is currently dominated by monopolists, and telephone companies are the most promising sources of real competition. Section 533(b) actually inhibits competition and diversity.

Section 533(b)'s complete ban is not narrowly tailored to serve any government interest. There is nothing unique about video programming that justifies imposing a total prohibition in order to prevent cross-subsidization and discrimination. The speculative risk of such anticompetitive behavior would be equally present in any line of business telephone companies might enter, but Section 533(b) imposes a ban only on cable television service. The FCC has developed a comprehensive regulatory scheme to prevent the very kind of anticompetitive behavior petitioners purport to fear. The Justice Department and the FCC have repeatedly expressed confidence in those measures. The government does not assert that those safeguards are inadequate to protect ratepayers or competitors.

ARGUMENT

I. SECTION 533(b) IS SUBJECT, AT A MINIMUM, TO INTERMEDIATE SCRUTINY

Amici agree with Bell Atlantic that Section 533(b) is subject to strict scrutiny under the First Amendment for the reasons set forth in respondents' brief. Nevertheless, we do not address those issues here because — as every court that has addressed this issue has found — the statute cannot survive even intermediate scrutiny. *A fortiori*, it would not survive strict scrutiny either.

A. Petitioners Bear a Rigorous Burden of Demonstrating that the Statute is Constitutional

The government and NCTA bear the burden of demonstrating that Section 533(b) is consistent with the First Amendment under the intermediate scrutiny standard. *Rubin* v. *Coors Brewing Co.*, 115 S. Ct. 1585, 1591-1592 (1995); *Turner*, 114 S. Ct. at 2470. That standard requires petitioners to demonstrate that the speech restriction actually "promotes a substantial government interest" and that it is narrowly tailored, so that the means chosen do not "burden substantially more speech than is necessary to further the government's legitimate interests." *Ward* v. *Rock Against Racism*, 491 U.S. 781, 799 (1989); see also *Turner*, 114 S. Ct. at 2469; *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968).[5]

[5] In addition to these elements, a restriction on speech must also "leave open ample alternative channels for communication." *Ward*, 491 U.S. at 791 (quoting *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)). The government acknowledges that the statute must meet this standard to survive intermediate scrutiny. Gov't Br. 24 (quoting *Ward*). The Fourth Circuit correctly found Section 533(b) unconstitutional on this independent ground. Pet. App. 49a. We agree with Bell Atlantic that petitioners' arguments on this point are unavailing, and we do not address the issue separately.

In *Turner*, the plurality applied the intermediate scrutiny standard and rejected many of the contentions petitioners make here.[6] The Court emphasized the substantiality of the government's burden in a case such as this:

- *First*, the government must identify the important "governmental interest" that the statute is designed to serve. *Turner*, 114 S. Ct. at 2470. It is not enough to identify an "abstract" interest. *Ibid.*
- *Second*, the government must demonstrate that the speech restriction *actually* furthers the identified interest. When the speech restriction is purportedly justified "as a means to redress past harms or prevent anticipated harms," the government "must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Ibid.*
- *Third*, even if the restriction does further an important interest by remedying a real harm, it still must be narrowly tailored. "[T]he Government still bears the burden of showing that the remedy it has adopted does not burden substantially more speech than is necessary to further the government's legitimate

[6] The section of the *Turner* opinion discussed here, 114 S. Ct. at 2470-2472, was joined by four members of the Court. Three others would have struck down the restriction outright, without need for further factfinding. See *id.* at 2479-2480 (O'Connor, J., concurring in part and dissenting in part) (finding must-carry rules unconstitutionally overbroad because not narrowly tailored). Justice Stevens, who dissented from the plurality's "application of [the] standard," did not disagree with the principles announced. See *id.* at 2473 n.1 (Stevens, J., concurring in part and concurring in the judgment).

interests." *Ibid.* (internal citations omitted); see also *id.* at 2479 (O'Connor, J., concurring in part and dissenting in part) ("Assuming arguendo that the provisions are justified with reference to the content-neutral interests in fair competition and preservation of free television, they nonetheless restrict too much speech that does not implicate those interests").

B. Deference to Congress is Not Appropriate Here

Petitioners ostensibly concede that intermediate scrutiny is the correct standard by which to determine Section 533(b)'s constitutionality. But they proceed to water down the requirements of that standard, contending that their mere assertion of a hypothetical "reasonable" basis for the law should justify a ban on speech. See, *e.g.*, Gov't Br. 29, 31-33, 35; NCTA Br. 41. Indeed, although the government urges the Court to defer, it suggests deference to a litigating position rather than to any legislative finding. Gov't Br. 29 ("the question for the courts is whether the regulation of speech is reasonably necessary to advance any significant interest of the government, not whether the enacting Congress expressly found it to be necessary").

Petitioners hypothesize various purposes that Section 533(b) might serve — but they cannot seriously maintain *either* that Congress made factual findings or empirical predictions embodying those speculations *or* that those speculations are supported by the weight of actual evidence. Instead, they urge this Court to impute to Congress the litigators' speculations, and then to defer to those speculations without proof that "the recited harms are real," or that Section 533(b) will "alleviate these harms in a direct and material way," or that the statute does not "burden substantially more speech than necessary." *Turner*, 114 S. Ct. at 2470, (internal quotations and ellipsis omitted). This would reduce intermediate scrutiny to mere "reasonableness" review, in defiance of this Court's many cases emphasizing the importance of rigorous testing of speech restrictions.

Turner suggests that there are two approaches the government might take to meet its substantial burden of justifying a statute such as Section 533(b): If Congress has made express findings of fact amounting to "predictive judgments," the government must "assure" the Court, in its "exercise [of] independent judgment," that "Congress has drawn reasonable inferences based on substantial evidence." *Turner*, 114 S. Ct. at 2471.[7] However, where — as here — Congress has made no such findings, the government must shoulder the more onerous burden of "defending the factual necessity" for a restriction on speech by putting forward real evidence of actual facts supporting the need for the statute in light of the interests it is designed to support. *Ibid.* This petitioners have not done and cannot do, given the government's repeated conclusions that the statute is not necessary.

Rather than "defending the factual necessity" for Section 533(b), petitioners seek to uphold the statute based on theories that Congress demonstrably did not itself consider. See, *e.g.*, Gov't Br. 31, 35; NCTA Br. 40, 42-43. Some could not have been conceived in 1984.[8] For example, the possibility of "discrimination" against competitive video providers seeking access to the telephone network could not have been part of Congress' consideration of the statute in 1984 because no one imagined then that cable companies would be dependent on the local telephone network to transmit video programming to consumers. Indeed, they are *not* dependent on the telephone network. Similarly, there is no evidence that Congress or anyone else thought that the Pole Attachments Act (47 U.S.C. § 224) had failed to achieve its purpose. Nor did Congress reject

---

[7] Even this standard is an exacting one: the Court vacated the lower court's judgment in *Turner*, requiring "the Government [to] further demonstrate" that the harms Congress feared would actually come about in the absence of the statute. 114 S. Ct. at 2472. This demonstration could take the form of "a more substantial elaboration * * * of the predictive or historical evidence upon which Congress relied, or the introduction of some additional evidence to establish that" the risk is real. *Ibid.* The government had ample opportunity here to present its best evidence; its own findings, however, preclude any showing that the risk is real.

[8] We agree with the government (Gov't Br. 29 n.19) that a statute may be justified by evidence and arguments that were not presented to, or not available to, Congress when it enacted the law. Instead of attempting to meet their burden of proving such a justification by offering real evidence of the need for the statute, petitioners grasp for unwarranted deference to a Congress that did not consider, and could not have considered, the justifications now presented to the Court.

the possibility of regulatory alternatives to a complete ban: the FCC had not yet developed its cost accounting and affiliate transaction rules, and Congress made no inquiry as to whether such rules could have solved the problem.

Petitioners appear to concede that Congress made no findings or predictive judgments in 1984 when it enacted Section 533(b). Their deference argument depends heavily on Congressional hearings and committee reports, as well as General Accounting Office (GAO) reports, dating from well *after* 1984. See, *e.g.*, Gov't Br. 33-34; NCTA Br. 16-17, 42. Congress' failure to repeal the statute in later years, however, cannot support petitioners' demand for deference. "[S]everal equally tenable inferences may be drawn from [congressional] inaction." *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 114 S. Ct. 1439, 1453 (1994) (internal quotation marks omitted). "[F]ailed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute." *Ibid.* (internal quotation marks omitted); see also *PBGC* v. *LTV Corp.*, 496 U.S. 633, 650 (1990). In *Central Bank* and other cases, this Court has rejected the argument that such materials can illuminate even the *meaning* of a statute passed earlier. Here petitioners would ascribe even more significance to the inaction of a later Congress, suggesting that a Committee report or hearing testimony from seven years after a statute's passage can substitute for the contemporaneous findings that might have motivated earlier legislators to support the original speech restriction.[9]

[9] Even if this argument had any merit, none of the cited materials amounts to a finding or predictive judgment. First, the government quotes a 1991 report of the Senate Commerce Committee as concluding that "cross-ownership restrictions like Section 533(b) 'enhance competition.'" Gov't Br. 10-11 (quoting S. Rep. No. 92, 102d Cong., 1st Sess. 46-47 (1991) (*1991 Senate Report*)); see also NCTA Br. 17. The government omits to mention that the quotation referred not primarily to Section 533(b), but to a wide array of cross-ownership restrictions (arguably supported by justifications of spectrum scarcity). It cannot be deemed a determination of the success of Section 533(b). The government also quotes an earlier report as "concluding that [the committee] should not at the present time support repeal." S. Rep. No. 456, 101st Cong., 2d Sess. 4-8 (1990), quoted in Gov't Br. 34. That report, however, was studiously neutral in its summary of conflicting opinion on the utility of the video programming ban (S. Rep. No. 456, at 4), and instructed the FCC to complete a study of Section 533(b). *Id.* at 8-9; see also *1991 Senate Report* at 18 (confirming that 1990 report did not determine underlying issues). The FCC did so the next year, when it recommended repeal. *Telephone Company-Cable Television Cross-Ownership Rules* (Second Report and Order), 7 FCC Rcd 5849, 5781, 5847 (1988) (*Video Dialtone Order*).

Of course, we agree that "Congress is not obligated, when enacting its statutes, to make a record of the type that an administrative agency or court does to accommodate judicial review." *Turner*, 114 S. Ct. at 2471, quoted in Gov't Br. at 29. But the government's invocation of that familiar principle is a non sequitur. We do not fault Congress for the absence of findings when it enacted the statute in 1984; we merely point out that the bare fact that Congress enacted a speech restriction does not bring into play the deference this Court reserves for express findings and actual predictive judgments. Nor do we contend that a finding must be included as a separate section within the body of a law passed by Congress (as in the 1992 Cable Act, reviewed in *Turner*). But here there is no evidence of *any* actual consideration; petitioners can point only to evidence of *later* debates on *different* bills that did not pass.

Indeed, deference is even less appropriate here than in *Sable Communications* v. *FCC*, 492 U.S. 115 (1989), where this Court rejected a similar argument by the government. In *Sable*, the government contended that the mere fact that a statute was enacted amounted to a congressional judgment that there was no less restrictive alternative to the complete ban at issue in that case. *Id.* at 129. In addition to emphasizing the impropriety of judicial deference in the face of a First Amendment claim, the Court also noted that there were no legislative findings to support the government's argument. "[A]side from conclusory statements during the debates by proponents of the bill, as well as similar assertions in hearings on a substantially identical bill the year before, * * * the congressional record presented to us contains no evidence as to *how* effective or ineffective the FCC's most recent regulations were or might prove to be." *Id.* at 129-130.

Even if this Court determined that Congress' silence could be deemed an implicit adoption of the justifications given 14 years earlier by the FCC when it imposed the regulatory ban on video programming, those justifications cannot support the statute now. As we show (pp. 19-20, *infra*), the FCC originally relied solely on concerns relating to pole attachments, which Congress specifically addressed in the 1978 Pole Attachments Act. The FCC's 1981 conclusion that the risk of cross-subsidy might justify retaining the ban was based solely on the absence of a comprehensive scheme to allocate shared costs between regulated and competitive ventures. Since then, the agency has developed just such a comprehensive scheme, which it has repeatedly identified as sufficient to control the potential for anticompetitive behavior. Thus, even if Congress once deferred to the FCC's regulatory justifications, there is no basis for judicial deference today — when the FCC itself has determined that those justifications are no longer present.

Petitioners seek to invoke uncritical deference for a reason: they are unable to support their pretextual justifications for Section 533(b) with any real evidence. As we show below, their asserted fears of anticompetitive behavior are all without foundation.

II. SECTION 533(b) CANNOT WITHSTAND INTERMEDIATE SCRUTINY

In *Turner*, this Court held that the government had not proffered sufficient evidence to support judgment in its favor.[10] The government's case here is far weaker than it was in *Turner*. Here, Congress made no findings of fact, either in 1984 or at any subsequent time, that the video programming ban is necessary to serve important governmental interests. Pet. App. 45a-46a & n.32. Here, "the two federal agencies responsible for formulating executive branch policy on telecommunications and antitrust matters agree that § 533(b) *does not* promote competition and diversity in cable television, and * * * may actually hinder the achievement of those objectives." *Ameritech*, 867 F. Supp. at 736; see also Pet. App. 96a (the ban "clearly operates in the first instance to restrict competition in the market for video programming"); J.A. 337-347 (excerpts from official agency positions concerning the effect of Section 533(b)). And here, the statute in question has clearly failed to achieve its avowed purpose of promoting competition and diversity: although the video programming ban has been in effect for 25 years, Congress itself has acknowledged that "[t]he cable industry has become highly concentrated." Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460, § 2(a)(4) (1992 Cable Act); see also J.A. 173, 174-178 (aff. of Thomas W. Hazlett). Under these circumstances, the video programming ban in Section 533(b) fails to satisfy the requirements of intermediate scrutiny. It is significant that, in spite of the best efforts of the government and the cable industry, every federal court to address the question, including the Fourth Circuit and the Ninth Circuit, has struck down Section 533(b).

[10] In *Turner*, the government had not itself moved for summary judgment below, but the district court granted judgment to the government based on its submissions in opposition to the plaintiffs' motion. See 114 S. Ct. at 155. Because the government had not had an opportunity to submit factual material in support of its position, the Court remanded for further proceedings. Here, by contrast, the government did move for summary judgment and did submit factual and other materials. As the district court noted, the parties presented "a comprehensive stipulation of facts and a supporting record consisting of several thousand pages of affidavits, exhibits, and briefs." Pet. App. 57a. There is, accordingly, no basis for a remand. This Court should affirm.

A. Petitioners Have Identified No Substantial Governmental Interest Actually Advanced by the Statute

The government and NCTA rely on the Fourth Circuit's statement that the government's interests in preventing anticompetitive behavior (thereby enhancing competition) and promoting diversity in cable television are substantial. Gov't Br. 24 (citing Pet. App. 38a-39a); NCTA Br. 36; see also Pet. App. 17a-18a. The government even quotes *Turner*'s statement that "eliminating restraints on fair competition" and assuring "access to a multiplicity of information sources" are "substantial" interests. 114 S. Ct. at 2470, quoted in Gov't Br. 24. Nowhere, however, do petitioners themselves describe the particular interests that Section 533(b) is purportedly designed to serve. See *Edenfield* v. *Fane*, 113 S. Ct. 1792, 1798 (1993) (looking to "the precise interests put forward by the [government]").

The government's quotation from *Turner* conveniently omits the sentence immediately following: "That the Government's asserted interests are important in the abstract does not mean * * * that the must-carry rules will in fact advance those interests." *Turner*, 114 S. Ct. at 2470; see also *Edenfield*, 113 S. Ct. at 1800. To satisfy intermediate scrutiny, abstract importance is not enough: the government must do more than just identify a purported concern; it must "demonstrate that the recited harms are real, not merely conjectural." *Turner*, 114 S. Ct. at 2470.

Petitioners' briefs show once again the importance of the analysis in *Turner*. The government and NCTA ask this Court to uphold Section 533(b) based solely on the "abstract" importance of the interests they assert. In fact, even the "abstract" interests of ensuring fair competition and diversity in the cable market are directly *disserved* by Section 533(b). As the Fourth Circuit noted, the statute "appears to inhibit competition and undermine diversity by effectively keeping the telephone companies * * * out of the cable business, thereby allowing cable companies to keep their monopolies." Pet. App. 17a-18a; see also *U S West*, 48 F.3d at 1102. To the extent that the larger government interest is promoting competition and diversity in the cable market, Section 533(b) is obviously counterproductive. See pp. 20-21, *infra*.

1. There is no substantial risk of cross-subsidization or discrimination.

It is revealing that the government never suggests that it *actually believes* that the ban is necessary to prevent anticompetitive behavior or to promote diversity. Instead, the government contends merely that some regulators have in the past used cross-ownership restrictions "to curtail the potential for abuse of market power and to encourage diversity in holdings." Gov't Br. 25 & n.15. The government does not contend that the statutes it cites would have survived the intermediate scrutiny that Section 533(b) must satisfy. The statutes there were either based on this Court's cases allowing greater restrictions on broadcast media (see *Turner*, 114 S. Ct. at 2456-2457) or they did not directly prohibit protected speech.

The twin fears raised by petitioners are "abstract," meritless, and completely pretextual. They do not take account of market

realities or the substantial legal and regulatory safeguards already in place.

Cross-subsidization would require a local telephone company — in addition to violating strict rules by misallocating costs common to telephone service and cable service and raising telephone rates to recover the difference — to charge inflated rates to telephone customers and predatorily low rates to cable customers, all the while avoiding detection by state and federal regulators, competitors, and ratepayers. Presumably, the telephone company's primary competitor, the incumbent cable operator, would not go quietly from its privileged position in the face of actual anticompetitive behavior.

Petitioners' discrimination claim is equally unrealistic. They hint that a telephone company might deny the incumbent cable operator access to poles and conduits. Gov't Br. 35; NCTA Br. 8 & n.5. The FCC referred to this issue when it adopted the regulatory predecessor to Section 533(b) in 1970, but Congress later adopted a statutory remedy (the 1978 Pole Attachments Act). 47 U.S.C. § 224. Petitioners do not seriously contend that the Pole Attachments Act is so inadequate and beyond repair that a ban on speech is required to accomplish its aims. See Pet. App. 42a (quoting *id.* at 102a n.29. Moreover, the government has found that cable operators already have access to virtually every home in America. *Telephone Company-Cable Television Cross-Ownership Rules* (Further Notice of Inquiry and Notice of Proposed Rulemaking), 3 FCC Rcd 5849, 5854 (1988) ("th[e] necessary access to poles and conduit to permit the growth of the cable industry has generally occurred"). The prospect of discrimination at this stage is simply fanciful.

Petitioners also suggest, without explanation or elaboration, that telephone companies could somehow discriminate against cable operators by controlling access to the telephone network. See Gov't Br. 36-37. This is simply absurd: cable operators have their own separate networks to transmit video programming to subscribers; they do not depend on the telephone network at all.[11] The existing

---

[11] NCTA's complaint about the (unrealistic) prospect of discrimination is ironic. Its own members have resisted laws designed to limit discrimination by cable operators. See, *e.g.*, *Turner*, 114 S. Ct. at 2454-2455.

cable networks provide an alternative to the telephone network and therefore a competitive check on the possibility of discrimination, and they would not be affected by any discrimination that the telephone companies might attempt. In the unlikely event that an existing cable operator goes out of business when faced with competition, its network will remain in place, offering a ready asset to a potential competitor that wants to challenge the telephone company.[12] Consequently, any resulting dominant market position would be contestable by other entrants. The existing cable industry, by contrast, is sheltered from competitive pressures by Section 533(b).

Petitioners' speculation about cross-subsidization and discrimination ignores a fundamental fact: incumbent cable operators dominate the market, reaching 98% of television households with their extensive network. See Gov't Br. 17-18 (citing hypothetical risk that telephone companies will drive out incumbent cable operators and "exten[d] their telephone monopoly to the cable market"). Telephone companies would be new entrants, trying to compete with established monopolist firms. Petitioners' purported concerns assume that the new entrant will drive the incumbent monopolist entirely out of the market by violating stringent legal and regulatory restrictions and evading regulatory and competitive monitors. Achieving this end would be practically, as well as legally, suspicious, and would require (unrealistically) that the new entrant be able to hide a pattern of substantial predatory pricing that is so successful it not only allows the entrant to obtain market share but completely reverses the relative roles of the two primary rivals. See, *e.g.*, *Matsushita Elec. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 589 (1986).

The FCC's comprehensive regulatory measures are designed specifically to prevent discrimination and cross-subsidization by telephone companies. These rules can be relied on to prevent the speculative ills hypothesized by petitioners. Indeed, the government petitioners themselves — both the FCC and the Department of Justice — have repeatedly and emphatically expressed confidence that

[12] NCTA acknowledges that the existing cable network may even compete with the telephone network for voice and data carriage, or for access to long-distance carriers. NCTA Br. 9.

the existing rules are sufficient to monitor and prevent anticompetitive practices (see pp. 26-27, *infra*). Congress has made no contrary judgment and petitioners have not shown that these safeguards are such abject failures that a ban on speech is required.

In short, there is no reason to believe that telephone companies could cross-subsidize or discriminate without detection, much less that they could do so to such an extent that they would inflict any competitive injury.

2. ***Historical materials do not support petitioners' argument.***

The government and NCTA allege that various historical experiences justify the ban in Section 533(b). For example, they contend that the 1982 consent decree settling the government's antitrust case against AT&T and the FCC's 1970 regulatory ban on telephone company video programming (the predecessor to Section 533(b)) can somehow be understood to support the statutory ban on speech. Those assertions are misleading in their descriptions of events and omit later developments that directly refute petitioners' arguments.

a. ***The Information Services decision confirms that Section 533(b) serves no purpose.***

Petitioners point to the consent decree that divested the Bell telephone companies from AT&T, suggesting that the 1982 settlement of a complex government antitrust case against AT&T justifies today's ban on telephone companies seeking to offer cable television. Gov't Br. at 25 & n.16; NCTA Br. 10-12. This argument distorts the record. In fact, the history of the consent decree since divestiture demonstrates conclusively that the government's assumptions and fears in *this* case — which petitioners assert are equivalent to those underlying the consent decree — are not borne out by experience.

The AT&T divestiture decree entered in 1982 prohibited the Bell telephone companies from providing "information services." *United States* v. *AT&T*, 552 F. Supp. 131, 227-229 (D.D.C. 1982), aff'd *sub nom. Maryland* v. *United States*, 460 U.S. 1001 (1983).[13]

[13] Only the Bell telephone companies (those owned by *amici* Ameritech, NYNEX, Pacific Telesis, SBC Communications, *amici* U S West and

That prohibition included video programming.[14] Thus, at the time Section 533(b) was enacted, the Bell companies were already prohibited from offering video programming.[15]

The information services prohibition was not based on any evidence that AT&T or the Bell telephone companies had ever engaged in anticompetitive behavior in that context: "The parties agreed to the information services restriction as a precautionary measure * * * ." *United States* v. *Western Elec. Co.*, 900 F.2d 283, 307 (D.C. Cir. 1990) (*Triennial Review*), *cert. denied*, 498 U.S. 911 (1990). The 1982 decree settled government antitrust allegations "centered exclusively on AT&T's activities in the interexchange-service [long-distance] and equipment-manufacturing markets." *Ibid.* "[T]here really was no record to speak of concerning AT&T's activities in the information services market" or in any other non-

BellSouth, and respondent Bell Atlantic) are covered by the decree. *Amicus* GTE is subject to a different decree. *United States* v. *GTE Corp.*, 603 F. Supp. 730 (D.D.C. 1984). The remaining telephone company *amici* (more than 1300 companies) have never been subject to the restrictions in either consent decree. Petitioners do not distinguish between these groups of telephone companies, simply assuming that the rationale of the decree applies with equal justification to all those subject to Section 533(b). There is no basis for such an assumption and it demonstrates again the poor fit of Section 533(b) to purported regulatory needs.

[14] See Reply Memorandum of FCC As Amicus Curiae, *United States* v. *Western Electric Co.*, C.A. No. 82-0192, at 6 n.10 (D.D.C. filed Jan. 18, 1991) (*FCC Reply Brief*) (Ct. App. J.A. 2671, 2684 n.10). The category of information services includes any service that involves generating, acquiring, packaging, or manipulating information that can be transmitted over a telecommunications network. *AT&T*, 552 F. Supp. at 229; see also *United States* v. *Western Electric Co.*, 673 F. Supp. 525, 589-590 (D.D.C. 1987) (listing examples).

[15] Because the restriction was the result of a voluntary settlement, it was not subject to First Amendment challenge. Thus, it is not surprising that telephone companies "did not oppose" Section 533(b) when Congress considered the proposal. See NCTA Br. 15. The minimal legislative history demonstrates that even Congress paid little attention to the specifics of Section 533(b). See *Id.* at 13 (legislative history is "not elaborate").

telecommunications market because the company had long been prohibited from entering those markets in a 1956 consent decree. *Ibid.* (citing *United States* v. *Western Elec. Co.*, 1956 Trade Cas. ¶ 68,246, at 71,138 (D.N.J. 1956)).

Since then, the decree parties (including the Department of Justice) and the courts have recognized that the hypothetical fears underlying this "precaution[ ]" were insubstantial and that continued exclusion of the Bell companies from providing information services (such as video programming) is unwarranted. Accordingly, the courts have lifted the information services restriction based largely on *the government's own representations* that there was no continuing need for it.

In 1987, three years after divestiture had been completed, the Justice Department conducted a full-scale review of the decree, including an "in-depth research" report by an independent consultant hired by the government. *Triennial Review*, 900 F.2d at 291. As a result of that review, and "[a]fter studying the comments of the parties and intervenors on its recommendations, the [Department] formally moved the court * * * for the removal of all the line of business restrictions," including information services. *Id.* at 292.[16] The Department was not alone: "With respect to the non-telecommunications and information services restrictions, all of the parties to the original decree — AT&T, the [Bell companies], and the [Department] — as well as the FCC agreed that the restrictions should be removed." *Ibid.*

The decree court at first declined to remove the information services ban entirely, prompting appeals by the Justice Department as well as the Bell companies. The D.C. Circuit held that the decree court should not have retained the information services restriction in the face of the government's (and every other party's) view that the restriction was not necessary to serve the public interest. *Id.* at 307-309. On appeal after remand, the D.C. Circuit affirmed the removal of the information services restriction. The court of appeals reviewed the substantial evidence before the district

[16] The Department recommended that the decree court leave intact the prohibition on local telephone companies offering certain long-distance ("interexchange") service.

court (much of it proffered by the Justice Department) that the information services ban was *not* necessary and was in fact anti-competitive. *United States* v. *Western Elec. Co.*, 993 F.2d 1572, 1578-1582 (D.C. Cir.) (*Information Services*), cert. denied, 114 S. Ct. 487 (1993). Significantly, those who then opposed the view of the telephone companies and the Justice Department raised the same specters that petitioners now point to: discrimination and cross-subsidization. *Ibid.* The *Information Services* court rejected those illusory fears. This Court should take notice that the government in that case not only recognized the insubstantiality of those concerns, but actually demonstrated to the court's satisfaction that discrimination and cross-subsidization were *not* real risks. See *id.* at 1580.[17]

The arguments raised here to support Section 533(b) are the same tired claims that were presented to, and repeatedly rejected by, the government and the courts in the information services context. For example, NCTA opposed the government's proposal to lift the information services restriction, arguing that it would give the Bell companies "unparalleled opportunities for cross-subsidization of and discrimination against cable operators." Br. of NCTA, *United States* v. *Western Elec. Co.*, at 15 (D.D.C. filed Oct. 17, 1990). It is telling that, since the information services restriction was lifted in October 1991, there has been no evidence of anticompetitive abuse by telephone companies offering information services. Petitioners' purported concerns here are even weaker because cable companies do not depend on access to telephone company facilities to deliver video programming to consumers.

[17] In addition to petitioners' misleading arguments based on the consent decree and the FCC's 1970 regulation, *amicus* California Cable Television Association (CCTA) alleges that a California telephone company has committed various misdeeds. CCTA Br. 13-16. These allegations are based on one-sided presentations of routine regulatory disputes. Contrary to CCTA's implication, neither the FCC, the California Public Utility Commission, nor any other independent reviewer has ever found that Pacific has engaged in cross-subsidization or discrimination.

b. The FCC's 1970 regulatory ban does not demonstrate a risk of anticompetitive behavior.

NCTA notes the development of the FCC's 1970 regulation prohibiting telephone companies from owning or operating cable television systems, which Congress codified in Section 533(b). NCTA Br. 5-6; see *Applications of Tel. Cos.*, 21 F.C.C. 2d 307, 324 (1970). One reason for imposing the ban in 1970 was to shelter a new and undeveloped cable television business from the full rigors of competition. *Video Dialtone Order*, 7 FCC Rcd at 5848 ("the ban gave cable television operators an opportunity to firmly establish themselves as viable competitors"); see also *Applications of Tel. Cos.*, 21 F.C.C. 2d at 314, 324-325. By 1992, however, the FCC recognized that there had been "enormous growth [in] the cable industry," which now holds "a leading position in the delivery and provision of video programming to the American public." *Video Dialtone Order*, 7 FCC Rcd at 5848; see also *Ameritech*, 867 F. Supp. at 727. In fact, Congress has found that the cable industry's unchallenged growth has had severe anticompetitive results. "The cable industry has become highly concentrated" and wields "undue market power," resulting in "barriers to entry for new programmers and a reduction in the number of media voices available to consumers." 1992 Cable Act §§ 2(a)(2), 2(a)(4). The government's purpose for restricting telephone company speech in 1970 — giving a fledgling industry a chance to develop — cannot support Section 533(b) today, when the statute protects a monopolistic media behemoth from the most promising source of competition.

When it adopted its regulatory ban in 1970, the FCC feared that telephone companies might use their control over telephone pole and conduit access to prevent competing cable companies from establishing networks to deliver video programming. *Applications of Tel. Cos.*, 21 F.C.C. 2d at 324. In 1978, Congress addressed that concern directly by authorizing the FCC to "regulate the rates, terms, and conditions for pole attachment." 47 U.S.C. § 224(b)(1); see also 47 C.F.R. § 1.1401 (implementing regulations).

Because the pole attachment statute largely eliminated the concern underlying the regulatory ban, a 1981 FCC staff report focused on a concern that the FCC expressly declined to rely on in 1970: the risk of anticompetitive cost-shifting, or cross-subsidization. J.A.

54-58; see also Pet. App. 94a (noting change from 1970 order to 1981 report). The 1981 report concluded that the ban should be retained until the FCC could develop regulations segregating the costs of a telephone company's regulated operations from the costs incurred in non-regulated, competitive businesses. *Id.* at 158, 175. The FCC has since developed and fully implemented just such a comprehensive cost allocation scheme (see pp. 24-26, *infra*).

Thus, since the regulatory ban was adopted, there have been significant changes in the regulatory, competitive, and technological environment. As a result, the FCC — to which Congress deferred in the first place — *now* has concluded that the reasons for banning telephone companies from the cable television business are no longer valid. See, *e.g.*, *Video Dialtone Order*, 7 FCC Rcd at 5848-5849.

3. *Section 533(b) is demonstrably anticompetitive.*

Although petitioners seek to justify Section 533(b) on the ground that it prevents anticompetitive behavior (*e.g.*, Gov't Br. 17; NCTA Br. 36-37), the irony of their position is that the statute itself is blatantly anticompetitive. Its primary effect is to block a sophisticated and able competitor — the local telephone company — from entering a market that would benefit from competition. In the statute's absence, telephone companies would provide an infusion of much-needed competition in the cable market. It is simply counterproductive to exclude the only real competitor under the guise of promoting competition. "Freedom of entry is the single most important guarantor of competition in a concentrated industry." *United States* v. *FCC*, 652 F.2d 72, 106 (D.C. Cir. 1980) (en banc).

The video programming ban has been in place (in statutory or regulatory form) for some 25 years.[18] In the real world and after

---

[18] The government suggests that Congress requires "a reasonable opportunity to experiment with solutions to admittedly serious problems." Gov't Br. 28-29 (quoting *City of Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41, 52 (1986)). Section 533(b) is not a new, "experiment[al]" rule. The statute must stand or fall based on the application of intermediate scrutiny *today*, not on whether Congress needed a reasonable opportunity to experiment in 1984. See also Gov't Br. 29 n.19.

a fair test, Section 533(b) has not promoted competition and diversity in cable television. To the contrary, Congress concluded in 1992 that "most cable television subscribers have no opportunity to select between competing cable systems," and that the "cable industry has become highly concentrated." 1992 Cable Act §§ 2(a)(2), 2(a)(4). In light of this indisputable fact, it is preposterous to contend that Section 533(b) promotes competition and diversity "in a direct and material way." *Turner*, 114 S. Ct. at 2470. The ban also subverts the purported goal of diversity in information sources by cutting off the expression of a whole category of speakers. See *Coors*, 115 S. Ct. at 1592 (holding that a labeling ban did not "directly and materially advance [the government's] asserted interest because of the overall irrationality of the Government's regulatory scheme").

None of this is mere speculation. The government agencies with regulatory and oversight responsibilities for the telephone and cable industries — petitioners FCC and the Justice Department, as well as the National Telecommunications and Information Administration (NTIA) — have *expressly found* that the ban should be removed because it impedes competition and limits diversity. J.A. 337-347. These formal, factual investigations and reports are within the scope of the agencies' regulatory jurisdiction, and this Court is entitled to rely on them — and not the position put forward by government litigators — concerning the state of the market and other facts relevant to the constitutional analysis.

4. *Petitioners have not met their burden of showing that Section 533(b) actually advances a substantial government interest.*

The requirement that a speech restriction actually advance the identified interests is critical to constitutional analysis under the intermediate scrutiny standard. *Turner*, *Coors*, and *Edenfield* are only the most recent examples of cases where the Court has focused on this element. Petitioners' briefs make little attempt to demonstrate that there is a real purpose behind Section 533(b) in today's world. Their identified concerns are based on outdated and inaccurate allegations, which cannot justify restricting telephone company speech today, especially in the absence of real competition in the cable market. Moreover, they are directly contradicted by official government findings.

B. Section 533(b) is Not Narrowly Tailored

The requirement of narrow tailoring should be rigorously applied, as this Court's decisions demonstrate. In recent years, the Court has struck down a number of restrictions because they failed the narrow tailoring requirement, many for the very same reasons that Section 533(b) fails this standard.

Thus, the Court rejected a blanket ban on in-person solicitation by accountants where the state's justification applied equally to solicitation by mail or advertisement. *Edenfield*, 113 S. Ct. at 1801; see also *City of Cincinnati* v. *Discovery Network, Inc.*, 113 S. Ct. 1505, 1516 (1993) (striking down a restriction on newsracks because it distinguished without reason between commercial and noncommercial publications). Here, Section 533(b) singles out cable programming, while the government's justifications apply just as well (or as badly) to all information services and even all competitive (nonregulated) businesses.

Just last Term, the Court held unconstitutional a federal law prohibiting disclosure of alcohol content on beer labels and advertisements. *Coors*, 115 S. Ct. at 1592 (noting the "overall irrationality of the Government's regulatory scheme," allowing alcohol content disclosure in many advertisements but not on labels). Here, telephone company regulators have recognized that telephone companies have significant new services and products to offer consumers, who will benefit from increased competition. Regulators have replaced blanket restrictions with comprehensive and sophisticated oversight of financial activities.

Also last Term, the Court held that a prohibition on all executive branch employees from receiving honoraria was not narrowly tailored to the government's asserted interest in employee efficiency. *United States* v. *National Treasury Employees Union*, 115 S. Ct. 1003, 1015 (1995) (noting the significant burden on the public's right to read and hear what the employees would write and say and that the vast majority of speech subject to the ban has no effect on the government's interests); see also *id.* at 1016-1017 (identifying aspects of the ban that "cast serious doubt on" the government's identified justifications). Here, prohibiting telephone companies from providing cable service denies the public the benefits of increased diversity and competition in the currently monopolized cable market.

The government could not prohibit the distribution of newspapers for the purpose of eliminating traffic injuries and deaths caused by newspaper delivery trucks — even if eliminating such injuries is a compelling interest and even if regulatory measures aimed directly at traffic safety were less effective. For the same reason, the government cannot forbid telephone companies from providing video programming out of a fear that they might cross-subsidize or discriminate. The risk of such behavior is inherent in any business venture undertaken by a rate-of-return regulated enterprise, and there has been no showing that regulatory alternatives are in fact inadequate.

1. *Petitioners' justifications for Section 533(b) are not unique to video programming.*

It is significant that the justifications raised by petitioners are not unique to the expressive activity of offering video programming.[19] In theory, telephone companies would be able to engage in cross-subsidization and discrimination whenever they enter *any* line of business other than regulated telephone service. Regulators and lawmakers have long recognized, however, that there is no justification for a total ban on such enterprises as publishing telephone directories, monitoring alarm systems, or providing information such as news and weather. See *Information Services*, 993 F.2d at 1578. Petitioners have identified nothing about the video programming business that suggests the dangers are greater here than elsewhere, but cable is the *only* expressive business that telephone companies are banned from entering. We believe it is also significant that cable is a business that the Court has recognized deserves constitutional protection. Since a rate-regulated company could (in

---

[19] In fact, as the lower courts found, the government's justifications have nothing to do with video programming at all. Any risk of cross-subsidization could arise only from joint costs between telephony and video *transport*, which is permitted by Section 533(b). There simply are no joint costs between telephony and video *programming*. Pet. App. 42a-43a; *id.* at 102a ("§ 533(b) is irrelevant to the telephone companies' ability to undertake such practices"); see also *U S West*, 48 F.3d at 1102, 1104.

theory) cross-subsidize any other line of business it enters, the government must point to some *unique* reason (something more than the mere possibility of cross-subsidy) for singling out a medium of protected *speech* for this sweeping prohibition.

Section 533(b)'s poor "fit" is no different than a hypothetical statute prohibiting electric utility companies from owning and publishing a newspaper. Such a ban could be justified on concerns of cross-subsidization and discrimination against competitors (newspapers who need electric power). In fact, this Court has struck down less drastic attempts to regulate the speech of utility companies. In the most recent case, the Court noted that the speech at issue, a newsletter included in billing envelopes, was "[i]n appearance no different than a small newspaper." *Pacific Gas & Elec. Co.* v. *Public Utility Comm'n*, 475 U.S. 1, 8 (1986) (plurality); see also *id.* at 19 (noting absence of narrow tailoring); *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n*, 447 U.S. 557, 570 (1980).

2. ***Existing regulatory safeguards protect against cross-subsidization and discrimination.***

Turner emphasizes that the government must demonstrate (and a reviewing court must determine) that there are no "availab[le] and efficac[ious] constitutionally acceptable less restrictive means of achieving the Government's asserted [objectives]." 114 S. Ct. at 2472 (internal quotation marks omitted). Here, petitioners dispute the propriety of the Fourth Circuit's holding that such less speech-restrictive alternatives *are* available to address the government's purported interests. Gov't Br. 27; NCTA Br. 40-41. We agree with Bell Atlantic's analysis of the flaws in that position. But petitioners do not address the narrower ground that supports the lower courts' judgment striking down the statute: that *existing* regulatory measures already address and prevent the potential for cross-subsidization and discrimination.

a. ***FCC regulations prohibit and prevent anticompetitive behavior.***

The regulatory regime prohibiting cross-subsidization has changed drastically since 1984, when Section 533(b) was enacted. First, the FCC has replaced rate-of-return regulation with price caps and average schedule rates, a regulatory system that removes any

incentive to cross-subsidize. See *Policy and Rules Concerning Rates for Dominant Carriers*, 5 FCC Rcd 6786 (1990), recon., 6 FCC Rcd 2637 (1991) (price-cap regulations); 47 C.F.R. § 69.606 (average schedule regulations);[20] see also *National Rural Telecom Ass'n* v. *FCC*, 988 F.2d 174, 178 (D.C. Cir. 1993) (under the price-cap system, there is no "reward for shifting costs from unregulated activities into regulated ones, for the higher costs will not produce higher legal ceiling prices"); *Information Services*, 993 F.2d at 1580 (price-cap regulation "reduces * * * ability to shift costs from unregulated to regulated activities"); *People of California* v. *FCC*, 39 F.3d 919, 926 (9th Cir. 1994) (a telephone company "would have little incentive to shift costs from nonregulated activities to regulated ones because it would not be able to increase regulated rates to recapture those costs"), cert. denied, 115 S. Ct. 1427 (1995).[21]

Second, the FCC has adopted detailed cost accounting rules designed to allocate costs carefully between regulated and non-regulated services. See, *e.g.*, *Separation of Costs*, 2 FCC Rcd 1298 (*Joint Cost Order*), recon., 2 FCC Rcd 6283 (1987), further recon., 3 FCC Rcd 6701 (1988), aff'd *sub nom. Southwestern Bell Corp.* v. *FCC*, 896 F.2d 1378 (D.C. Cir. 1990); *Bell Operating Co. Safeguards and Tier 1 Local Exchange Co. Safeguards*, 6 FCC Rcd 7571, 7594 (1991) (*BOC Safeguards*). These rules did not exist in 1984, when Congress enacted Section 533(b), and the FCC's 1981 Staff Report specifically identified the absence of such a regulatory

---

[20] The average schedule rules establish a system by which over 600 telephone companies, nearly half of those subject to the ban in Section 533(b), set prices according to a schedule based on the total costs incurred by all participating companies. Use of this formula (like the price-cap regime) reduces the incentive and ability of telephone companies to cross-subsidize because interstate rates for these companies are not directly tied to their individual company costs.

[21] NCTA contends that the FCC's (and many states') move to price-cap regulation is meaningless unless it is "pure price cap regulation, severing all connection to costs." NCTA Br. 37 n.31 (internal quotation marks omitted). But there is no support for that proposition. Even where the regulator retains some residual authority to account for costs, there is no significant potential for cross-subsidy.

regime as a justification for retaining the ban at that time. J.A. 58. Thus, the only justification that can even indirectly be attributed to Congress — the absence of regulatory means to control the risk of cross-subsidization — is simply no longer true.

The FCC's *Joint Cost* rules (1) impose detailed cost allocation standards, (2) establish accounting procedures, audit requirements, and other implementation and enforcement mechanisms, and (3) set rules for recording transactions between regulated telephone companies and their corporate affiliates. See *People of California*, 39 F.3d at 926. Under the cost allocation standards, telephone companies are required, in apportioning costs between regulated and nonregulated services, to (a) charge the nonregulated activity for tariffed services at the tariffed rates (and apply an equivalent credit to the regulated service providing the tariffed services); (b) directly assign all costs, whenever possible, to either regulated or nonregulated activities; and (c) group unassignable "common" costs into certain categories and allocate them according to a specific methodology. *Joint Cost Order*, 2 FCC Rcd at 1318. In addition, all common investment costs relating to "central office equipment and outside plant" must be allocated "based upon the relative regulated and nonregulated usage of the investment at the highest forecast relative nonregulated usage over the life of the investment." *Id.* at 1319 (emphasis added). In this way, the *Joint Cost* rules impose a systematic bias in favor of the customers of the regulated activity (thereby preventing cross-subsidization and counteracting it to the extent it goes undetected) by ensuring that joint costs are to some extent shifted automatically to the nonregulated activity from the regulated — not vice versa.

b. The government has repeatedly and formally found that existing regulatory safeguards are effective.

The FCC and the Justice Department have both emphatically found that the existing regulatory safeguards are adequate to protect ratepayers and competitors. In its most recent pronouncement on the subject, the FCC has found "that our current regulatory safeguards against cross-subsidy are sufficient to protect telephone ratepayers when a telephone company provides cable service over [ ] a stand-alone cable system." *In Re: Telephone Company-Cable Television Cross-Ownership Rules* (Fourth Report and Order), FCC

95-357, at 9, ¶ 18 (rel. Aug. 14, 1995) (*Fourth Report*). The FCC specifically identified price cap rules, affiliate transaction requirements, and the cost allocation rules in the *Joint Cost Order*. See *id.* at 9-10 & nn. 43-45. Significantly, the *Fourth Report* did not even address fears of discrimination, implicitly acknowledging the unreality of that concern where telephone companies offer traditional cable television service. See *id.* at 9 (identifying as "a primary concern * * * [only] that telephone ratepayers not bear the burden of the investment in [cable] systems").

The *Fourth Report* is just the most recent of many FCC affirmations that its regulatory safeguards protect ratepayers and prevent anticompetitive behavior, including cross-subsidization and discrimination. See also, *e.g.*, *Video Dialtone Order*, 7 FCC Rcd at 5827 ("existing safeguards against discrimination and cross-subsidization" suffice to "protect against potential anticompetitive conduct"). The Justice Department has also approved these safeguards, expressing its view that FCC regulations suffice to protect ratepayers from cross-subsidization and protect competitors from discrimination. For example, both the FCC and the Justice Department made the same admission — that regulatory safeguards are sufficient to address the problems of cross-subsidization and network discrimination — in the *Information Services* litigation (see pp. 17-18, *supra*). *Information Services*, 993 F.2d at 1580.[22] See also *Ameritech*, 867 F. Supp. at 734-35 ("The FCC and DOJ have taken the position that * * * concerns about cross-subsidization and network discrimination could be addressed by federal regulations. * * * In this litigation, the Government states that 'the defendant agencies stand by their assessment.'")

---

[22] See Memorandum of United States in Support of Motions for Removal of the Information Services Restriction, *United States* v. *Western Electric Co.*, C.A. No. 82-0192, at 15-33 (D.D.C. filed Aug. 22, 1990) (Ct. App. J.A. 2631-2649); Reply Memorandum of United States in Support of Motions for Removal of the Information Services Restriction, *United States* v. *Western Electric Co.*, C.A. No. 82-0192, at 6, 60-65 (D.D.C. filed Jan. 18, 1991) (Ct. App. J.A. 2790-2795); *FCC Reply Brief* at 25 (Ct. App. J.A. 2703).

We do not mean to suggest — as petitioners might characterize our argument (Gov't Br. 32 n.21) — that the views of executive and independent agencies should trump a legislative determination. Rather, these government pronouncements are important precisely because there has been no legislative determination here (thus, there is no occasion for deference to Congress, see pp. 6-10, *supra*). Intermediate scrutiny requires careful justification of a speech restriction by demonstrating its *actual* effects. *Turner*, 114 S. Ct. at 2470. Petitioners simply have not shown that, in the real world, there is any deficiency in the existing regulatory safeguards requiring a complete ban on speech. All the available evidence — and all of petitioners' statements in other fora — demonstrate the opposite: that the existing safeguards do an excellent job of monitoring and preventing anticompetitive abuses.

c. Petitioners have not shown that regulatory safeguards are inadequate.

Petitioners have no real evidence of regulatory failure. They point to two GAO reports, hinting that the GAO determined that cross-subsidization is not redressable by regulatory measures. Gov't Br. 31, 33. In fact, the reports criticize only the insufficient staffing at the FCC; notably, they recognize in principle the efficacy of the *Joint Cost* rules as a means of controlling cross-subsidies. *E.g.*, J.A. 83, 124. Indeed, the Court should view the government's arguments here with substantial skepticism; they are flatly contradicted by repeated public pronouncements of the FCC and the Justice Department. See *Video Dialtone Order*, 7 FCC Rcd at 5828 ("while some parties contend that the FCC lacks the resources to adequately protect against anticompetitive conduct, we note that we have previously concluded that this contention is without merit") (footnote omitted).[23] As we have shown (pp. 8-9 & note 9, *supra*), the various post-1984 committee reports and snippets of hearing testimony simply do not support the view that Congress or any other government entity actually believed that the FCC's regulatory measures are inadequate.

[23] Even if this Court were to seriously entertain an argument that petitioner FCC has elsewhere conceded "is without merit," the argument must be rejected. Surely hiring a few more auditors is a less restrictive means of accomplishing the government's objectives than silencing the video programming speech of the telephone companies. If Congress and the Administration do not consider the regulatory objective important enough to warrant additional audit staff, the government should not be heard to claim that the objective is important enough to satisfy heightened scrutiny under the First Amendment.

C. Petitioners Have Not Met Their Burden Under Intermediate Scrutiny

Economic regulation not affecting speech is subject to deferential review when challenged in court. If Congress wishes to exclude one class of competitors to preserve the position of another, the Constitution does not stand as a bar, so long as litigators defending the law can suggest a reasonable basis for the restriction. But, as this Court recently reaffirmed in *Turner*, Congress has no such latitude when it restricts protected speech.

Where, as here, the government bars willing speakers from an entire medium of communications that is now dominated by monopolists, and explains its ban with the assertion that the restriction promotes competition, it bears a heavy burden of justification. This is a burden that petitioners do not meet — indeed, they have scarcely even attempted to meet it. For the government petitioners to demonstrate that Section 533(b) actually *advances* the objectives of competition and diversity would require them to contradict the conclusions of every study of the issue they have undertaken in the past eight years. Their only hope is to persuade this Court to avert its eyes from the actual regulatory record and reverse the unanimous judgments of federal courts in ten different cases on the basis of hypothetical, unproven, and implausible theories that were *never* adopted (or even considered) by Congress, that were *repudiated* by petitioners themselves, and that were concocted solely for the purpose of this litigation. The First Amendment demands more.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

MARY MCDERMOTT
LINDA KENT
CHARLES D. COSSON
1401 H Street, N.W.
Washington, DC 20005
Counsel for United States Telephone Association

MICHAEL W. MCCONNELL*
KENNETH S. GELLER
H. THOMAS BYRON III
Mayer, Brown & Platt
2000 Pennsylvania Avenue, N.W.
Washington, DC 20006
(202) 463-2000

Counsel for Amici Curiae

* *Counsel of Record*

DAVID COSSON
L. MARIE GUILLORY
2626 Pennsylvania Ave., N.W.
Washington, D.C. 20037
Counsel for The National Telephone Cooperative Assoc.

LISA M. ZAINA
21 Dupont Circle, N.W.
Washington, D.C. 20036
Counsel for The Organization for the Protection and Advancement of Small Telephone Companies

THOMAS P. HESTER
KELLY R. WELSH
30 South Wacker Drive
Chicago, Illinois 60606
Counsel for Ameritech Corp.

MORRISON DES. WEBB
JOHN M. CLARKE
JOHN P. WALSH
1113 Westchester Avenue
White Plains, New York 10604
Counsel for NYNEX Corp.

THOMAS E. TAYLOR
CHRISTOPHER J. WILSON
Frost & Jacobs
2500 PNC Center
201 East Fifth Street
Cincinnati, Ohio 45202
Counsel for Cincinnati Bell Telephone Company

MICHAEL J. SHORTLEY, III
180 South Clinton Avenue
Rochester, New York 14646
Counsel for Frontier Corp.

ELLYN ELISE CRUTCHER
121 South 17th Street
Mattoon, Illinois 61938

OWEN E. MACBRIDE
Schiff, Hardin & Waite
7200 Sears Tower
Chicago, Illinois 60606
Counsel for Illinois Consolidated Telephone Company

RICHARD W. ODGERS
LUCILLE M. MATES
130 Kearny Street
San Francisco, Calif. 94108

ALAN F. CIAMPORCERO
1275 Pennsylvania Ave.,N.W.
Washington, D.C. 20004
Counsel for Pacific Telesis Group

JAMES D. ELLIS
LIAM S. COONAN
KELLY M. MURRAY
MARY W. MARKS
175 E. Houston
San Antonio, Texas 78205

MARTIN E. GRAMBOW
1401 I Street, N.W.
Washington, D.C. 20005
Counsel for SBC Communications Inc.

MADELYN M. DEMATTEO
ALFRED J. BRUNETTI
227 Church Street
New Haven, Conn. 06510
Counsel for The Southern New England Telephone Co.